



## ***Cluster Munitions (Prohibitions) Bill [HL]***

RESEARCH PAPER 10/11 11 February 2010

This briefing on the provisions of the *Cluster Munitions (Prohibitions) Bill [HL]* has been prepared for the Second Reading debate on the Bill in the House of Commons, for which no date has yet been set. The Conservatives and Liberal Democrats have given their full support to the Bill, which made its way through the House of Lords without amendment.

The main purpose of this Bill is to create criminal offences in order to enforce the prohibitions set out in Article 1 of the *Convention on Cluster Munitions*, an international treaty which bans the use, production, transfer, and stockpiling of cluster munitions on the grounds that they cause unacceptable harm to civilians, and establishes measures to minimise the harm to civilians in the aftermath of conflicts. While this briefing focuses mainly on the provisions of the Bill and the course of its progress through Parliament so far, it also provides a short background to the Convention itself and discusses some of the issues that will face those seeking in future to implement its provisions at the national and international levels.

94 states signed and four states ratified the *Convention on Cluster Munitions* at a ceremony in Oslo on 3 December 2008. The UK was among the signatories, although it was a relatively late convert to proposals for a total ban. Once the Bill has passed into law, the UK will then move to ratify the Convention. The Convention has yet to come into force. The Government has announced that it intends to destroy all UK stockpiles by the end of 2013.

Members may also wish to consult House of Lords Library Note 2009/011, *Cluster Munitions (Prohibitions) Bill* (3 December 2009). For background, see also House of Commons Standard Note SN/IA/4339, *Cluster Munitions* (last updated 21 May 2007).

Jon Lunn





## Recent Research Papers

### 2010

<b>10/01</b>	Economic Indicators, January 2010	06.01.10
<b>10/02</b>	Social Indicators	19.01.10
<b>10/03</b>	Unemployment by Constituency, December 2009	20.01.10
<b>10/04</b>	Financial Services Bill: Committee Stage Report	20.01.10
<b>10/05</b>	Mortgage Repossessions (Protection of Tenants etc.) Bill [Bill 15 of 2009-10]	25.01.10
<b>10/06</b>	Co-operative and Community Benefit Societies and Credit Unions Bill [HL] [Bill 50 of 2009-10]	27.01.10
<b>10/07</b>	Sunbeds (Regulation) Bill [Bill 19 of 2009-10]	27.01.10
<b>10/08</b>	Flood and Water Management Bill: Committee Stage Report	28.01.10
<b>10/09</b>	Local Authorities (Overview and Scrutiny) Bill [Bill 16 of 2009-10]	02.02.10
<b>10/10</b>	Economic Indicators, February 2010	02.02.10

### Research Paper 10/11

**Contributing Authors:** Jon Lunn, Conventional Arms Control, International Affairs and Defence Section

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to our general terms and conditions which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

We welcome comments on our papers; these should be e-mailed to [papers@parliament.uk](mailto:papers@parliament.uk).

**Contents**

- Summary** **1**
- 1 Why is the Bill needed?** **3**
- 2 About the *Convention on Cluster Munitions*** **3**
- 3 Content of the Bill** **5**
- 4 The Bill in the House of Lords** **6**
  - 4.1 First Reading 6
  - 4.2 Second Reading 6
  - 4.3 Committee Stage 9
  - 4.4 Report Stage and Third Reading 11
- 5 Implementing the *Convention on Cluster Munitions*: Future issues** **11**
  - 5.1 Universalisation 11
    - Negotiating the relationship between the Convention on Cluster Munitions and the Convention on Certain Conventional Weapons 13
  - 5.2 UK export controls and destruction of stockpiles 14
  - 5.3 Enforcing new obligations 15
  - 5.4 Investments in cluster munition production 16



## Summary

The main purpose of the *Cluster Munitions (Prohibitions) Bill [HL]* is to create criminal offences in order to enforce the prohibitions set out in Article 1 of the *Convention on Cluster Munitions (CCM)*, an international treaty which bans the use, production, transfer, and stockpiling of cluster munitions on the grounds that they cause unacceptable harm to civilians, and establishes measures to minimise the harm to civilians in the aftermath of conflicts.

The main criminal offences created are:

- Using, developing or producing, acquiring, possessing or transferring prohibited munitions, or arranging for another person to acquire or transfer prohibited munitions;
- Assisting, encouraging or inducing another person to commit any of the above offences.

These offences will be punishable by imprisonment for up to 14 years or an unlimited fine, or both. The offences, if committed in the UK, will apply to any person. They also apply extra-territorially to UK nationals, Scottish partnerships and bodies incorporated under UK law. They may be also applied to acts committed by bodies incorporated in the Overseas Territories by Order in Council. In addition, the Bill creates a number of more minor offences relating to interference with or obstruction of the authorities as they implement the Convention, or failure to maintain records and provide required information. The Bill also gives the Secretary of State, or persons authorised, powers of search and entry and establishes procedures for the removal, immobilisation and destruction of any prohibited munitions that are found.

The Conservatives and Liberal Democrats have given their full support to the Bill, which has made its way through the House of Lords without amendment (five were tabled but withdrawn at Committee Stage). However, a range of issues were discussed in the Lords, including the time-frame for the removal of US cluster munitions on British soil, which are due to be removed from sites in the UK in 2010 and from all UK territories by 2013. Also raised was the question of 'indirect financing' of cluster munition production by banks and other financial institutions which invest in companies which produce a range of goods, including such munitions. The Government's view is that the Convention only bans the provision of funds which directly contribute to the manufacture of cluster munitions and that the Bill should reflect that. The Government has decided that, in the first instance, a voluntary code of conduct should be tried with regard to 'indirect financing' and has begun consultations with stakeholders. Concerns were also raised in the Lords about how the UK, including its armed forces, should relate to states that are not party to the Convention, particularly in the sphere of military co-operation. The Government believes that the legal position of the armed forces will be adequately safeguarded. Finally, there were questions in the Lords about the 'complementarity' of the Bill with the provisions of the Export Control Order 2008, under which cluster munitions are subject to the most stringent trade controls. The Government's view is that it has "double-checked" this and remains sure that they are compatible.

94 states signed and four states ratified the CCM at a ceremony in Oslo on 3 December 2008. The UK was amongst the signatories, although it was a relatively late convert to proposals for a total ban. While the Government had voluntarily withdrawn all 'dumb' cluster munitions from service in March 2007, it was not until the Dublin conference in May 2008 that it agreed to withdraw its 'smart' cluster munitions as well. Once the current Bill has passed into law, the UK will then move to ratify the Convention. The Government has announced that it intends to destroy all UK stockpiles by the end of 2013.

The Convention is viewed by its supporters as a step forward for the international law of weapons treaties in a range of ways – for example, for its coverage of both functioning and

malfunctioning cluster munitions, the clarity and breadth of its definitions of the weapon; its expansion and strengthening of victim assistance obligations; its attribution of a special responsibility for the clearance of explosive remnants of war to States Parties that have used cluster munitions; the inclusion of a requirement for States Parties to promote support for the Treaty and its norms; and – more contentiously – an implied duty to prevent non-state actors from using cluster munitions.

The Convention has yet to come into force. There are a range of issues that will face those seeking in future to implement its provisions at the national and international levels. Not least among them are 'universalising' the Convention – that is, encouraging as many states as possible, including major users and producers such as the US, China, Russia, India, Pakistan and Israel that stayed outside the 'Oslo process', to sign and ratify it. Part of the challenge in this regard will be handling the relationship between the Convention on Cluster Munitions and the UN-based negotiations on cluster munitions that have been taking place since 2001 under the Convention on Certain Conventional Weapons (CCW). The 'Oslo process' which led to the CCM arose out of frustration on the part of some states that the CCW process would not lead to a legally binding instrument. There remain fears that the continuing CCW process will give the major users and producers still outside the CCM a pretext for remaining so. The Government disagrees, viewing the CCW process as a valuable "step along the road". Other challenges to be faced in future include the destruction of stockpiles, strengthening assistance to victims, upholding the special responsibility of States Parties that have used cluster munitions for the clearance of explosive remnants of war, tackling the use of cluster munitions by non-state armed groups and ending all investment in cluster munition production.



## 1 Why is the Bill needed?

According to the Explanatory Notes that accompany the Bill:

3. The main purpose of this Bill is to create criminal offences in order to enforce the prohibitions set out in Article 1 of the Convention on Cluster Munitions that was signed by the Foreign Secretary in Oslo on 3rd December 2008, and to which the United Kingdom wishes to become a State Party. The Convention on Cluster Munitions will be referred to in these notes as “the Convention.”

4. Article 1 of the Convention prohibits States Parties from using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring cluster munitions; and from assisting, encouraging or inducing anyone else to engage in these prohibited activities. The Article 1 prohibitions also apply to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. Criminalising these prohibited activities is necessary because Article 9 of the Convention stipulates that:

“Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”<sup>1</sup>

Once criminal offences have been created through this Bill, the UK will then move to ratify the *Convention on Cluster Munitions*.

Signatories to an international treaty are expected, pending ratification, to refrain from acts which would defeat its object and purpose.<sup>2</sup> Treaties are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown (the ‘Royal Prerogative’). Parliament does not currently have a direct role in treaty ratification but – as in this case – there may be parliamentary activity relevant to it, such as the passing of legislation needed to implement a treaty. Passing this Bill is not formally part of ratification, but it is necessary for ratification to proceed smoothly and to avoid potential conflicts between national obligations under the treaty and the domestic legal order.

## 2 About the *Convention on Cluster Munitions*<sup>3</sup>

The *Convention on Cluster Munitions* (henceforth, the Convention) was adopted by 107 states at a Dublin conference on 30 May 2008. As described above, the Convention introduces a total ban on cluster munitions (its negative obligations). However, the Convention also incorporates a range of measures for stockpile destruction, clearance, victim assistance, compliance and national implementation (its positive obligations).

Article 2.2 of the Convention defines cluster munition as follows:

“Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions.<sup>4</sup>

---

<sup>1</sup> Available at: [http://www.publications.parliament.uk/pa/ld200910/ldbills/002/en/index\\_002.htm](http://www.publications.parliament.uk/pa/ld200910/ldbills/002/en/index_002.htm) [all links in footnotes accessed at 10 February 2010]

<sup>2</sup> Article 18 of the *Vienna Convention on the Law of Treaties*

<sup>3</sup> Full text available at: [http://www.clusterconvention.org/downloadablefiles/ccm77\\_english.pdf](http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf)

<sup>4</sup> Subsequent sections of Article 2 go on to describe what this definition does not cover and set out additional relevant definitions – for example, “explosive submunition” and “failed cluster munition”

On 3 December 2008, at a ceremony in Oslo, 94 states signed and four ratified the Convention. At the time of writing, the number of signatories has risen to 104. Ratifications stand at 27, which is three short of the 30 needed to bring the Convention into force, which will happen six months after the thirtieth ratification has been lodged.<sup>5</sup> Reservations by States Parties are not permitted.<sup>6</sup> Until the Convention comes into force, cluster munitions remain circumscribed by customary humanitarian law and existing regional and national export control regulatory frameworks.

The Convention is viewed by its supporters as a step forward for the international law of weapons treaties in a range of ways – for example, for its coverage of both functioning and malfunctioning cluster munitions, the clarity and breadth of its definitions of the weapon; its expansion and strengthening of victim assistance obligations; its attribution of a special responsibility for the clearance of explosive remnants of war to States Parties that have used cluster munitions; the inclusion of a requirement for States Parties to promote support for the Treaty and its norms; and – more contentiously – an implied duty to prevent non-state actors from using cluster munitions.<sup>7</sup>

The UK was amongst the signatories in Oslo. However, its stance had not always been so unambiguously positive. While the Government had voluntarily withdrawn all ‘dumb’ cluster munitions from service in March 2007, it was not until the Dublin conference in May 2008, -- which the Prime Minister, Gordon Brown, attended – that it agreed to withdraw its ‘smart’ cluster munitions. Previously the Government argued that, because ‘smart’ cluster munitions were able to discriminate between targets and had mechanisms to self-destruct, self-neutralise or self-deactivate, they did not cause unacceptable harm to civilians and should remain in service.<sup>8</sup> Following this change of stance, the Government has announced that all UK stockpiles will be destroyed by the end of 2013.

Assuming that the UK ratifies the Convention in the near future, it is required to submit its first report under the Convention within 180 days of the Convention entering into force. Thereafter, it must present an annual report setting out what steps it has taken to honour its obligations under the Convention.<sup>9</sup> The UK hopes to play a full part at the first meeting of States Parties to the Convention, which is expected to take place in Laos in November 2010.<sup>10</sup>

The negotiating process that culminated in the December 2008 ceremony had begun two years’ earlier, when Norway, supported by other states, announced that it was launching its own initiative outside of UN disarmament negotiations under the auspices of the *Convention on Certain Conventional Weapons* (CCW), which had failed to produce agreement to move towards a legally binding ban. Canada had previously taken the same course in the 1990s with regard to landmines.<sup>11</sup>

---

<sup>5</sup> The Cluster Munition Coalition keeps a running total of current signatures and ratifications on its website. See: <http://www.stopclustermunitions.org/treatystatus/>

<sup>6</sup> Reservations are declarations by a state that it considers itself exempt from one or more specific provisions of an international treaty. Where reservations are permitted, other states may declare that they do not accept them. States Parties are those states that have ratified or acceded to an international treaty. ‘

<sup>7</sup> B. Docherty, “Breaking new ground: The Convention on Cluster Munitions and the evolution of International Humanitarian Law”, *Human Rights Quarterly*, 31 (2009), pp. 943-59. Available at: [http://muse.jhu.edu/journals/human\\_rights\\_quarterly/v031/31.4.docherty.html](http://muse.jhu.edu/journals/human_rights_quarterly/v031/31.4.docherty.html)

<sup>8</sup> For a discussion of the military utility of cluster munitions, see Library Standard Note SN/IA/4339, *Cluster Munitions* [last updated 21 May 2007]

<sup>9</sup> HL Deb 8 December 2009 c1021

<sup>10</sup> *Ibid.*, c1024

<sup>11</sup> Docherty, “Breaking new ground”, p. 938

The CCW process led in 2003 to the adoption of Protocol V to the CCW on Explosive Remnants of War, but this did not contain any prohibitions on the production, use, stockpiling or transfer of cluster munitions, focusing instead on post-conflict assistance to reduce the long-term effects of their use. The UK has signed, but not ratified, Protocol V, which came into force in 2006.<sup>12</sup>

### 3 Content of the Bill

This section of the paper briefly describes some of the main aspects of the Bill, which, when passed, will be known as the *Cluster Munitions (Prohibitions) Act 2010*. The Act will extend to England, Wales, Scotland and Northern Ireland.

**Clause 1** (along with Schedule 1) sets out the munitions to which the legislation will apply. It does so in terms of the definitions given in the Convention.

As stated above, the Bill is primarily concerned with the creation of criminal offences in order that the UK can enforce its obligations under the Convention. The Explanatory Notes that accompany the Bill summarise the main criminal offences set out in **Clause 2** of the Bill and the punishment that may be incurred:

14. Clause 2 creates the criminal offences which are central to this Bill. The offences apply to breaches of the prohibitions set out in Article 1(1) of the Convention. These criminal offences are the penal sanctions required by Article 9 of the Convention set out in paragraph 4 above.

15. *Subsection (1)* makes it an offence for a person to use, develop or produce, acquire, possess or transfer prohibited munitions. It also makes it an offence to make arrangements under which another person either acquires or transfers a prohibited munition.

16. *Subsection (2)* makes it an offence for a person to assist, encourage or induce another to engage in any conduct mentioned in subsection (1).

17. *Subsection (3)* provides that an offence under this clause will be punishable on conviction on indictment with imprisonment for up to fourteen years or an unlimited fine, or both.<sup>13</sup>

The Bill creates several other offences in subsequent enforcement Clauses, some of which are also punishable by a term of imprisonment (see below).

**Clause 4** of the Bill defines to whom the offences created in Clause 2 will apply. It establishes that the offences, if committed in the UK, will apply to any person. If committed elsewhere in the world, they will apply extra-territorially to UK nationals, Scottish partnerships and bodies incorporated under UK law.<sup>14</sup> Clause 2 may be applied to acts committed by bodies incorporated under the laws of the Channel Islands, the Isle of Man or any Overseas Territory by Order in Council.

**Clauses 5-9** provide defences for certain permitted purposes set out in the Convention – for example, where a person is involved in the destruction of cluster munition stockpiles or in

---

<sup>12</sup> For further information about Protocol V, see the UN disarmament webpage on the CCW at: [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument)

<sup>13</sup> Available at: [http://www.publications.parliament.uk/pa/ld200910/ldbills/002/en/index\\_002.htm](http://www.publications.parliament.uk/pa/ld200910/ldbills/002/en/index_002.htm)

<sup>14</sup> A Scottish Partnership is a business established in Scotland under *The Partnership Act of 1890*. The Government has stated that not all countries that have passed implementing legislation have included extra-territorial application in its provisions. See HL Deb 8 December 2009 c994

training on disposal techniques, or where military personnel or UK nationals are involved in international military operations or activities with states that have not ratified the Convention.<sup>15</sup>

**Clauses 11-16** give a range of powers to the Secretary of State, or persons authorised by her/him, including the power to enter premises and search for prohibited munitions, and then to remove, immobilise or destroy them. Clause 14 provides that, subject to proper notification being served within six months, munitions that have been removed must be destroyed, or authorised for destruction, within twelve months, with reasonable costs being incurred by the person who had possessed the munitions, or otherwise returned to that person. Clause 15 provides for the same arrangements for munitions that it is practicable to immobilise but not remove.

**Clause 18** creates additional offences relating to interference with procedures set out in Clauses 11-16. These offences are punishable by fines, with the exception of knowingly making a false or misleading statement in response to a notice and then being convicted on indictment, rather than by summary conviction. A penalty of up to two years' imprisonment or a fine, or both, applies in this instance.

**Clause 20** enables the UK to make the reports required by the Convention, the first of which is required of States Parties within 180 days of the Convention entering into force and annually thereafter. It gives the Secretary of State the powers, subject to proper notification, to require people to maintain records and provide relevant information. Failure to comply is subject to a fine or, if a person knowingly makes a false or misleading statement and is convicted on indictment, two years' imprisonment or a fine, or both.

**Clauses 21-22** provide powers to search and obtain evidence. Wilful obstruction of these powers is punishable by fines.

**Clause 23** protects information by making it an offence, subject to a number of exceptions, to disclose any information obtained under the Bill or the Convention. The disclosure of information in contravention of this Clause is punishable by fines and/or up to two years' imprisonment.

**Clauses 24-28** cover the role of the Attorney General or the Attorney General for Northern Ireland, forfeiture in case of conviction, offences by bodies corporate, safeguards in connection with the exercise of powers of entry, and service of notices.

## **4 The Bill in the House of Lords**

### **4.1 First Reading**

The First Reading of the Cluster Munitions (Prohibition) Bill [HL] took place on 19 November 2009. It was introduced as Bill 2 of 2009-10.

### **4.2 Second Reading**

The Second Reading of the Bill took place on 8 December 2009.

The Bill was universally welcomed.

Moving the Bill, Baroness Kinnock of Holyhead said:

---

<sup>15</sup> In the Explanatory Notes, this is referred to as the "interoperability defence". Further clarification of Clause 9 can be found in Schedule 2 of the Bill.

This Bill and the UK's subsequent ratification will send a clear, strong signal and a political message to other countries that a new standard is being established in international humanitarian law. With this legislation the UK will again set a strong example and continue our leading role in making the world a safer and more secure place.<sup>16</sup>

Baroness Northover, International Development spokesperson for the Liberal Democrats, and the Rt Hon Lord Howell of Guildford, Foreign Affairs spokesperson for the Conservatives, both enthusiastically welcomed the Bill. Many contributors to the debate paid particular tribute to Lords Dubs and Elton for their efforts on the issue over the years, working closely with the Cluster Munition Coalition (CMC), a broad-based coalition of NGOs, to persuade the Government to support a total ban.<sup>17</sup>

A range of questions and concerns were raised by contributors to the debate. Below is a brief summary of some of the points made and Baroness Kinnock's specific response, where one was given.<sup>18</sup>

Baroness Northover was amongst those who asked for specific information about when the UK's stockpile will be destroyed and when the US's holdings of cluster munitions on UK soil will be removed.<sup>19</sup> Lord Hannay of Chiswick also raised this last concern.<sup>20</sup> Lord Lee of Trafford asked whether the time-frame for the removal of US cluster munitions on British soil, which under the Convention is required within eight years of it coming into force, could be accelerated.<sup>21</sup>

Baroness Kinnock emphasised that US stockpiles were under UK jurisdiction but not UK control. She added that, following an agreement signed by the two governments in June 2008:

[...] our understanding is that the US has identified the cluster munitions on UK territory as exceeding operational planning requirements. These cluster munitions will be removed from sites in the UK in 2010 and from all UK territories by 2013.<sup>22</sup>

Responding to a Government statement made the day before the Second Reading, Baroness Northover was also amongst those who raised the "indirect financing" of cluster bomb production by banks and other financial institutions which invest in companies that produce a range of goods, including cluster munitions, calling on the Government to take action on the issue.<sup>23</sup> In drafting the Bill, the Government has taken the view that the Convention only imposes a ban on the provision of funds that directly contributed to the manufacture of cluster munitions. Such "direct financing" will be illegal under the Bill, if passed. However, this means that the provision of funds to companies that manufacture a range of goods, including cluster munitions – indirect financing – will not be illegal under the

---

<sup>16</sup> HL Deb 8 December 2009 c996

<sup>17</sup> In late 2006 Lord Dubs had introduced a Cluster Munitions (Prohibition) Bill in the Lords, where it was passed. It was sent to the Commons but did not get beyond its First Reading. The CMC's website is available at: <http://www.stopclustermunitions.org/>. For its most recent newsletter, see: <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/11/cmc-newsletter-october.pdf>

<sup>18</sup> She undertook to write to those whose questions were not addressed in her response.

<sup>19</sup> HL Deb 8 December 2009 c1000

<sup>20</sup> *Ibid.*, c1010-11

<sup>21</sup> *Ibid.*, c1015

<sup>22</sup> HL Deb 8 December 2009 c1020. The US Visiting Force is required to provide an annual declaration of its inventory of weapons to the Ministry of Defence. The number, types and locations of these weapons is not made public for "operational and security reasons, and to ensure relations between the UK and US are not prejudiced". See HC Deb 8 December 2009 c206W.

<sup>23</sup> HL Deb 8 December 2009 c1000. For the full text of the Government's Written Statement on the issue, see HC Deb 7 December 2009 c2WS.

Bill. The Lord Bishop of Salisbury suggested that the Bill be amended to “include a comprehensive prohibition on investment in, or provision of, financial services to any company involved in the production of cluster munitions”, citing Luxembourg and Ireland as states that had taken this step.<sup>24</sup> Lord Howell agreed that the issue “needs more attention”.<sup>25</sup>

Baroness Kinnock responded that “the complex nature” of indirect financing means that further consultation is needed on the issue. She said that voluntary “guidance” would be developed but that the issue should not be allowed to hold up the UK’s efforts to ratify the Convention.<sup>26</sup> She stated that Ireland had banned only public financing and that Luxembourg had not provided for any sanctions in law against such investment. She asserted that the Government’s approach would cover all public and private financing and establish an “effective prohibition on financing”.<sup>27</sup> Later, she also said that the Government would consider reviewing “public investment guidelines”.<sup>28</sup> This issue is discussed in greater detail in section 5.4 of this paper.

Lord Dubs was amongst those who urged the Government to persuade all the countries of the Commonwealth and beyond, including the major users and producers that had not yet done so, to sign and ratify the Convention.<sup>29</sup>

The Lord Bishop of Salisbury was the first to express concerns about how the UK, including its armed forces, should relate to states that are not party to the Convention, particularly in the sphere of military co-operation. He suggested that the Bill should contain more restrictive provisions in these regards, or at least “some kind of code of practice”.<sup>30</sup> Lord Howell raised this issue in terms of the military concept of “interoperability”, stating that future joint operations should not become “tangled up in interminable arguments about interpreting the convention”.<sup>31</sup> He sought reassurance on the matter.

Baroness Kinnock replied that Clause 9 of the Bill and the provisions of the Convention:

safeguard the legal position of our military on the ground, including in the most exacting combat situations, to avoid any prosecution or difficulty that may occur as they continue to work alongside coalition partners who are not yet ready to sign up to the convention.<sup>32</sup>

More generally, the Lord Bishop of Salisbury argued that the Bill should be more comprehensive in its coverage of the issues and include fuller references to the “positive obligations” set out in the Convention.<sup>33</sup> Lord Hannay also raised this last point.<sup>34</sup>

Lord Hannay also asked whether there was a case for “challenge inspections” under the Convention and whether non-signatories might be persuaded to establish a *de facto*

---

<sup>24</sup> HL Deb 8 December 2009 c1006

<sup>25</sup> *Ibid.*, c1017

<sup>26</sup> *Ibid.*, c1021

<sup>27</sup> *Ibid.*, c1022

<sup>28</sup> *Ibid.*, c1022

<sup>29</sup> *Ibid.*, c1002-3

<sup>30</sup> *Ibid.*, c1005-6

<sup>31</sup> *Ibid.*, c1018

<sup>32</sup> *Ibid.*, c1021

<sup>33</sup> *Ibid.*, c1006-7

<sup>34</sup> *Ibid.*, c1010

moratorium on the use of cluster munitions where there are civilian populations.<sup>35</sup> Baroness Kinnock of Holyhead agreed to “see what progress we can make on these matters”.<sup>36</sup>

Lord Hannay further expressed concern about the ‘complementarity’ of the Bill and the Export Control Order 2008 (SI 2008 No. 3231), which designated cluster munitions as ‘Category A’, and thereby subject to the most stringent trade controls. Baroness Kinnock had described the Order as having “effectively banned trade in cluster munitions by any UK entities.”<sup>37</sup> Lord Hannay characterised the 2008 Order as “a bit more rigorous” than the Bill.<sup>38</sup> However, Baroness Kinnock assured him that they are entirely complementary, including with regard to the trans-shipment of cluster munitions, which, she clarified, is also banned under the Bill.<sup>39</sup>

Baroness Whitaker was puzzled as to why the Bill states that the Attorney-General’s consent is required for prosecution, arguing that other laws do not do so.<sup>40</sup> Baroness Kinnock agreed to consider this point.<sup>41</sup>

Lord Howell expressed some reservations about the way in which the Bill grants powers to officials to enter people’s homes. He acknowledged that these powers may be necessary but said that care should also be taken over how such powers are exercised.<sup>42</sup>

Baroness Tonge asked the Government pro-actively to look ahead and try to identify the weapons currently in development which, in ten years’ time, politicians and campaigners may have to ban on humanitarian grounds – with a view to pre-empting their production.<sup>43</sup> Lord Lee of Trafford suggested that such a weapon might be the ballistic sensor fused munition, which is due to come into service in 2012.<sup>44</sup> In reply, Baroness Kinnock declined to speculate but sympathised with the “sentiments” expressed by Baroness Tonge. Baroness Kinnock assured Lord Lee that the ballistic sensor fused munition would be “compliant with the requirements of the convention.”<sup>45</sup>

Also discussed were issues such as past military use by the UK and other states of cluster munitions, and the transparency, reporting and victim assistance provisions of the Convention.

The Bill was read a second time without a vote and committed to a Grand Committee of the House.

### 4.3 Committee Stage

The Committee sat on 6 January 2010. Five amendments were proposed by Lord Howell, speaking for the Conservatives. Following discussion and clarification, all were withdrawn, leaving the provisions of the Bill unchanged. Lord Hannay, amongst others, was also an active participant in the discussion.

---

<sup>35</sup> HL Deb 8 December 2009 c1011-12

<sup>36</sup> *Ibid.*, c1023

<sup>37</sup> *Ibid.*, c992-93

<sup>38</sup> *Ibid.*, c1011

<sup>39</sup> *Ibid.*, c1023

<sup>40</sup> *Ibid.*, c1008

<sup>41</sup> *Ibid.*, c1022

<sup>42</sup> *Ibid.*, c1019

<sup>43</sup> *Ibid.*, c1014-15

<sup>44</sup> *Ibid.*, c1015

<sup>45</sup> *Ibid.*, c1023

*Amendment 1* proposed that the Bill should include a ban in Clause 2 on the indirect financing of cluster bomb production. Replying, Baroness Kinnock restated the arguments against doing so that she had made during the Second Reading, reiterating that the Government did not preclude the possibility of legislation on the question in future if the voluntary code of conduct which it is now pursuing with interested private sector parties proves impossible to agree or is ultimately ineffective.<sup>46</sup>

*Amendment 2* proposed that the Bill should include a provision in Clause 6 requiring the Government to publish guidelines establishing the maximum number of prohibited munitions that may be retained for “permitted purposes”, such as training, detection, clearance and destruction measures. Baroness Kinnock argued that, as required under the Convention, the Government will limit the number that are retained and make this information public. However, she said:

It is difficult to anticipate how many cluster munitions we may need to retain for the training and development of countermeasures. The number may change depending on current circumstances [...] To set a fixed number in the Bill would make it inflexible and difficult to meet such needs.<sup>47</sup>

Baroness Kinnock also noted that the Bill in this regard “mirrors similar provisions in the Landmines Act 1998.”<sup>48</sup>

*Amendment 3* proposed that the Bill in Clause 16 should refer to the need for evidence before the Secretary of State can exercise their power to authorise entering a premises where there are prohibited munitions. Baroness Kinnock argued that there were already adequate safeguards specified in both Clause 16 and Clause 27 of the Bill. She added that the Government had submitted a memorandum on the Bill’s powers of search and entry to the Joint Committee on Human Rights, which “is fully satisfied that the Bill does not give rise to any human rights issues.”<sup>49</sup>

*Amendment 4* proposed that the Bill in Clause 20 should require anyone holding cluster munitions for permitted purposes to submit an annual report to the Secretary of State on the quantity being held and the reasons for holding them. Baroness Kinnock replied that the existing provisions in the Bill were adequate with regard to obtaining the necessary information and that here too they were similar to those to be found in the Landmines Act 1998, in relation to which there had been “no difficulties”. Under this Act, the Ministry of Defence

“requires that individuals provide annually details on the quantity retained [...] We intend that the mechanism for retained cluster munitions will be the same and that we will follow the same process.”<sup>50</sup>

*Amendment 5* related to concerns expressed by several members of the Lords about whether the Bill is compatible with the Export Control Order 2008. Lord Howell proposed a change to the wording of Clause 34 which would require the Secretary of State to issue a statement that this is the case before the Bill becomes law. Baroness Kinnock said that, following the Second Reading, where the issue had been raised, the Government had undertaken a “double check”, remained sure that this was the case, and that such an amendment was therefore unnecessary.

---

<sup>46</sup> HL Deb 6 January 2010 GC3-5

<sup>47</sup> Ibid., GC5-7

<sup>48</sup> Ibid., GC7

<sup>49</sup> Ibid., GC13-14

<sup>50</sup> Ibid., GC15-17



Lord Howell also raised questions regarding Clauses 1 (defining the munitions to which the Bill applies) and 9 (on “international military operations and activities”) in the context of debate about whether they should stand part of the Bill. After discussion and clarifications from Baroness Kinnock, these Clauses were agreed as drafted.<sup>51</sup> In the course of the discussion of Clause 1, Baroness Kinnock reassured Lord Howell that the Bill’s prohibitions “do not extend to munitions designed to produce electrical or electronic effects such as the CBU-94/B.”<sup>52</sup>

#### 4.4 Report Stage and Third Reading

The Report stage took place on 20 January 2010. The Third Reading was held on 8 February 2010. There was no further substantive debate at either juncture and the Bill was sent, without amendment, to the House of Commons for its consideration.

## 5 Implementing the *Convention on Cluster Munitions*: Future issues

### 5.1 Universalisation

A range of challenges face those states, including the UK, which are committed to the success of the Convention. The first challenge is to secure the 30 ratifications that will, six months on from when this is achieved, bring the Convention into force. Efforts to implement the Convention can then begin, although – as is the case with the UK – signatories may have already begun to take steps in this direction (see below). There is also nothing to prevent signatories from seeking to persuade other states to sign and ratify the Convention without delay, although it is accepted that states that have ratified will be in a stronger position to do so.

A priority for EU Member States that have signed or ratified the Convention will be persuading other EU Member States to sign it. Finland, Poland, Romania, Estonia, Latvia, Slovakia and Greece are yet to sign.<sup>53</sup> Poland has explicitly indicated that it does not intend to sign.<sup>54</sup> Finland, Estonia and Slovakia were amongst the countries which adopted the Convention at the Dublin conference in May 2008, which keeps alive hopes that they will eventually sign the treaty. At the time of writing, Norway, Ireland, Germany, Austria, Luxembourg, Slovenia, Malta, France, Spain and Belgium have both signed and ratified the Convention. All the other Member States have signed but not yet ratified it.

The Government has stated that it will be giving priority to persuading fellow Member States of the Commonwealth to sign and ratify the Convention. As at early December 2009, 26 Commonwealth member states, including the UK, had signed it. At the Commonwealth Heads of State and Government Meeting in Trinidad and Tobago in November 2009, the Government co-sponsored, with Australia, a declaration inviting non-signatories to sign the Convention. During the Second Reading of the Bill in the Lords, Baroness Kinnock said that she would be writing to all Commonwealth Foreign Ministers represented by High Commissioners in London urging them to sign as soon as possible.<sup>55</sup>

---

<sup>51</sup> HL Deb 6 January 2010 GC1-3 and 7-13

<sup>52</sup> Ibid., GC2

<sup>53</sup> According to the Cluster Munition Coalition, Romania, Poland, Greece and Slovakia have produced and stockpiled cluster munitions, while Estonia has stockpiled cluster munitions. See: <http://www.stopclustermunitions.org/take-action/>

<sup>54</sup> However, according to Human Rights Watch, Poland (along with Finland and Romania) has restricted the use of cluster munitions to their own national defence. Poland has also established “submunition reliability criteria for future production”. See: [http://www.hrw.org/sites/default/files/related\\_material/2009.11.18.%20HRW%20Cluster%20Chart,%20Update%20d.pdf](http://www.hrw.org/sites/default/files/related_material/2009.11.18.%20HRW%20Cluster%20Chart,%20Update%20d.pdf)

<sup>55</sup> HL Deb 8 December 2009 c996

These efforts will contribute significantly to what is often described as the ‘universalisation’ of the Convention. However, perhaps the largest challenge will be winning over the major users and producers that did not participate in the ‘Oslo process’ – namely the US, China, Russia, India, Pakistan and Israel. Particular hope had been expressed by some observers that the Obama Administration would alter the US position once it took office. In December 2007, the US Congress passed legislation which restricted the export of cluster munitions to another country unless these munitions had at least a 99 per cent reliability rate and the importing country had pledged in writing that it would not use the weapon in civilian areas. These restrictions were made permanent in March 2009.<sup>56</sup> However, although a wide-ranging review of US conventional arms control policy is being conducted, the Administration’s stance on signing and ratifying the Convention has not yet changed and, on the face of it, looks unlikely to do so in the near future.<sup>57</sup>

A State Department statement claims:

The United States shares in the international concern about the humanitarian impact of *all* munitions, including cluster munitions. That is one of the reasons that it spends more than any other country to eliminate the risk to civilians from landmines and all explosive remnants of war, including unexploded cluster munitions. That is also why the United States strongly supports negotiations on cluster munitions within the framework of the Convention on Conventional Weapons (CCW; <http://ccwtreaty.state.gov/aboutccw.htm>). All of the nations that produce cluster munitions are represented in the CCW.

Cluster munitions have demonstrated military utility. Their elimination from U.S. stockpiles would put the lives of its soldiers and those of its coalition partners at risk. Moreover, cluster munitions can often result in *much less collateral damage* than unitary weapons, such as a larger bomb or larger artillery shell would cause, if used for the same mission.<sup>58</sup>

In its response to the Foreign Affairs Committee’s June 2009 report on non-proliferation issues<sup>59</sup>, the Government stated:

The Foreign Secretary made clear on signing the Convention on 3 December 2008 that the UK is committed to universalising the Convention on Cluster Munitions. The Government will encourage States outside the Convention to join it and will continue to support European Union efforts to promote the widest possible adherence to the Convention. The example we set by our own implementation will also be important in persuading other countries to join the Convention; in particular swift ratification will add

---

<sup>56</sup> “Obama takes US closer to total ban on cluster bombs”, *The Guardian*, 13 March 2009. See also “US Congress takes action on cluster bombs, child soldiers”, *IPS*, 21 December 2007.

In addition, according to Human Rights Watch, the US has established “submunition reliability criteria for future production” and has pledged that after 2018 it will no longer use cluster munitions that result in more than one per cent unexploded ordnance. See: [http://www.hrw.org/sites/default/files/related\\_material/2009.11.18.%20HRW%20Cluster%20Chart,%20Update.pdf](http://www.hrw.org/sites/default/files/related_material/2009.11.18.%20HRW%20Cluster%20Chart,%20Update.pdf)

<sup>57</sup> By contrast, the current review has led, for example, to announcements that the US would in future support UN-mandated efforts to agree an International Arms Trade Treaty and would also attend the December 2009 Review Conference on the 1997 Mine Ban Treaty.

<sup>58</sup> Available at: <http://www.state.gov/t/pm/wra/c25930.htm>. For a full official statement of the US’s cluster munitions policy, released in July 2008, see: <http://www.defenselink.mil/releases/release.aspx?releaseid=12049>

<sup>59</sup> Foreign Affairs Committee, *Global Security: Non-Proliferation*, Fourth Report, Session 2008-09, HC 222, 14 June 2009. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaaff/222/222.pdf>

credibility to these efforts. The Government is committed to ratification as soon as possible.<sup>60</sup>

### ***Negotiating the relationship between the Convention on Cluster Munitions and the Convention on Certain Conventional Weapons***

In its report, the Foreign Affairs Committee raised the question of how the UK's commitment to universalising the Convention might most effectively be upheld. In doing so, it was referring to the wider issue of the negotiating process on cluster munitions that has been under way since 2001 under the auspices of the *Convention on Certain Conventional Weapons* (CCW).<sup>61</sup>

As already discussed in section 2 of this paper, the negotiating process that led to the Convention on Cluster Munitions arose out of concerns that the ongoing CCW negotiations lacked credibility because key major users and producers, including the US, China, Russia, India, Pakistan and Israel, were not prepared to commit themselves to a legally binding instrument. Numerous activists and observers continue to voice these concerns. Roy Isbister of the UK Working Group on Arms, a coalition of NGOs which campaigns on a range of non-proliferation issues, said in evidence to the Foreign Affairs Committee:

I think it would be a crying shame if the CCW introduced its own instrument on cluster munitions that could be in competition with what has already been agreed in the Oslo process. [...] The chances of the CCW producing something that could compete with the cluster munitions treaty would be pretty low, so I would be very nervous about that.<sup>62</sup>

The CCW process continues. A Group of Governmental Experts has been meeting periodically. There is a draft protocol on cluster munitions on the table.<sup>63</sup> However, this draft protocol does not propose a total ban on the use, production and transfer of cluster munitions and is considerably weaker in its provisions than the Convention.

The Foreign Affairs Committee concluded:

50. We conclude that the negotiation of a Protocol on cluster munitions under the Convention on Certain Conventional Weapons might not be an appropriate foreign policy objective for the UK. We recommend that, if it decides to continue arguing for such a Protocol, the Government should ensure that any such Protocol is as strong in its provisions as the Convention on Cluster Munitions. It should withdraw its support for such a Protocol if it appears that this will not be the case.<sup>64</sup>

The Government does not accept that the two processes need be in competition. In its response to the report, the Government replied:

---

<sup>60</sup> *Response to the Fourth Report of the Foreign Affairs Committee, Session 2008-09, Global Security: Non-Proliferation*, Cm 7692, August 2009. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcaff/222/response.pdf>

<sup>61</sup> For the UN's disarmament webpage on the CCW, see: [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument)

<sup>62</sup> Foreign Affairs Committee, *Global Security: Non-Proliferation*, Fourth Report, Session 2008-09, HC 222, 14 June 2009, para. 305. See also an August 2009 memorandum by the Cluster Munition Coalition at: <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/08/cmcmemoccwaug2009.pdf>

<sup>63</sup> A draft protocol has been on the table since 2007. For the latest version (dated 26 August 2009), see: [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/DFCDFAFA34278B5E5C1257620004D7238/\\$file/CLUSTER+MUNITIONS+CHAIR.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/DFCDFAFA34278B5E5C1257620004D7238/$file/CLUSTER+MUNITIONS+CHAIR.pdf)

<sup>64</sup> *Response to the Fourth Report of the Foreign Affairs Committee, Session 2008-09, Global Security: Non-Proliferation*, Cm 7692, August 2009, para. 50

The Government believes that it is right to explore all possible avenues to end the humanitarian impact of cluster munitions. The goal of a global Convention on Cluster Munitions will take time. In the meantime these weapons continue to pose a threat to civilians. That is why to complement our main effort – to secure the widest possible adherence to the Convention on Cluster Munitions – the UK will also continue to support efforts to deal with these weapons within the Convention on Certain Conventional Weapons (CCW). The Government would like to see agreement on a strong and meaningful protocol that would effectively contribute to preventing the use and proliferation of cluster munitions. The added value of a CCW protocol would be that those countries which are the major users and producers of cluster munitions, but which have not signed the Convention on Cluster Munitions, are present in the CCW.<sup>65</sup>

In earlier evidence to the Foreign Affairs Committee, Bill Rammell, then Minister of State at the Foreign and Commonwealth Office, had also stated:

The protocol is, if you like, a step along the road and a rung up the ladder for those countries that cannot yet sign up to the convention for financial reasons. For a number of states, that is a legitimate concern. In those circumstances, it must be better to get some controls—on exports, for example—rather than none, on major producers [...] in all our bilateral and multilateral contacts, we make it clear that that is a short-term step towards eventual adoption of the Oslo convention.<sup>66</sup>

## 5.2 UK export controls and destruction of stockpiles

As stated earlier, the UK has already begun to move towards implementation of the Convention's provisions. With regard to the UK's regime of export controls, the Foreign and Commonwealth Office informed the Foreign Affairs Committee that:

All cluster munitions have been classified as Category 'A' goods, making them subject to the most stringent level of trade controls and thereby taking an immediate step to prevent proliferation.<sup>67</sup>

A crucial aspect of implementation of the Convention will be the destruction of all cluster munition stockpiles under UK jurisdiction and control. In a parliamentary answer in February 2009, Bob Ainsworth, then Minister of State at the MOD, stated:

We will have eight years, from entry into force of the Convention on Cluster Munitions for the UK, to destroy all cluster munition stockpiles under UK jurisdiction and control. [...] All UK cluster munition types have been withdrawn from service. A progressive UK cluster munition disposal programme has begun, with some munitions already destroyed. We expect that all UK stockpiles will be destroyed by 2013 which we anticipate will be four or five years ahead of the deadline.<sup>68</sup>

During the Second Reading of the Bill in the Lords, Baroness Kinnock stated that nearly 13 million out of a total of 38 million submunitions held in UK stocks had already been destroyed.<sup>69</sup>

---

<sup>65</sup> *Response to the Fourth Report of the Foreign Affairs Committee, Session 2008-09, Global Security: Non-Proliferation*, Cm 7692, August 2009, para. 50

<sup>66</sup> Foreign Affairs Committee, *Global Security: Non-Proliferation*, Fourth Report, Session 2008-09, HC 222, 14 June 2009, para. 305

<sup>67</sup> *Ibid.*, para. 303

<sup>68</sup> HC Deb 23 February 2009 c25W

<sup>69</sup> Later, she stated that the value of the UK's stockpiles is £180 million. See HC Deb 8 December 2009 cc995 and 1023

The ban on cluster munitions under the Convention also applies to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. According to a recent press report, the UK – along with France – has sought proposals from companies for the disposal of older stocks of Multiple Launch Rocket System munitions that are armed with cluster munitions. According to this report, the MOD needs to dispose of 27,000 such rockets.<sup>70</sup>

### 5.3 Enforcing new obligations

The Convention will pose particular challenges of implementation for all States Parties with regard to issues where new obligations have been created (see section 2 of this paper). Two such issues are victim assistance and the special responsibility of States Parties that have used cluster munitions for the clearance of explosive remnants of war.

With regard to victim assistance, Baroness Kinnock said during the Second Reading of the Bill in the Lords:

[...] in accordance with the convention and existing practice, any cluster munitions victims under the UK's jurisdiction or control will receive all the assistance that they require, and there will be no discrimination between cluster munitions victims and those who have suffered injuries or disabilities from other causes. We would also collect any relevant data on cluster munition victims.<sup>71</sup>

With regard to clearance, Baroness Kinnock set out what the Government has already done over the past decade:

Over the past decade, the Department for International Development has provided more than £10 million a year to clear landmines and other explosive remnants of war, including cluster munitions. This year the department has continued with clearance in Afghanistan, Angola, Azerbaijan, Cambodia, the Democratic Republic of Congo, Laos, Lebanon, Mozambique, Somaliland and Sudan. It also provided an additional £1 million for emergency clearance in Sri Lanka, helping the safe return of the civilian population. This strong support for clearance efforts where they are most needed will continue.<sup>72</sup>

A potentially more contentious new obligation is the implied duty which, some argue, the Convention creates with regard to non-state armed groups (NSAGs) such as Hezbollah. Docherty asserts that States Parties will have an implied duty, based on the wording of the preamble to the Convention, to prevent NSAGs from acting in contravention of it.<sup>73</sup> Docherty claims that the Convention contains three legally binding provisions that should be applied to NSAGs. There should be no transfers to them; no assistance to them in connection with activities prohibited under the Convention; and national implementation measures to “prevent and suppress” prohibited activities should be applied to them. Under international law, NSAGs cannot currently become party to the Convention – or to any other international treaty, for that matter.

---

<sup>70</sup> France needs to dispose of 22,000 such rockets. French sources have said that its process of disposal needs to begin by mid 2010 if all its cluster munitions stocks are to be destroyed by 2016. “UK and France mull munition disposal plans”, *Jane's Defence Weekly*, 18 November 2009

<sup>71</sup> HL Deb 8 December 2009 c1022

<sup>72</sup> HL Deb 8 December 2009 c995

<sup>73</sup> Docherty, “Breaking new ground”, p. 959

Docherty argues:

The attention of the Convention on Cluster Munitions to NSAGs is important because such groups have used the weapons. Most recently, Hezbollah launched 118 cluster munitions into Israel during the war in summer 2006. It was the first confirmed use of the Chinese-made MZD-2 submunition. While Israel's use of cluster munitions in south Lebanon dwarfed that of Hezbollah, the strikes showed the danger of the proliferation of these weapons beyond state arsenals. Other NSAGs have used cluster munitions in Bosnia between 1992 and 1995, Croatia in 1995, and possibly Tajikistan between 1992 and 1997. As the specific mention of the problem of NSAGs in the preamble makes clear, the intent of the Convention on Cluster Munitions is that states parties should seek to prevent NSAGs from taking actions prohibited by the treaty.

With its explicit reference to NSAGs, the convention also lays the groundwork for weapons treaties to address the behavior of more parties. Instead of merely relying on indirect clauses related to proliferation and use, it names NSAGs and suggests that the states in which they operate have a duty to limit their activities. By moving in the direction of more stringent IHL instruments, the Convention on Cluster Munitions could inspire future weapons treaties to go even further. Ultimately such treaties could impose both binding obligations on states parties to regulate NSAGs and responsibility on the groups themselves to control their own conduct.<sup>74</sup>

The UK Government does not seem, as yet, to have made a public statement setting out its views on this specific issue.

#### **5.4 Investments in cluster munition production**

The Cluster Munition Coalition (CMC), the NGO coalition which played an important part in campaigning for a Convention, has made this issue the focus of its most recent campaign, which is called 'Stop Explosive Investments'.<sup>75</sup> The campaign seeks a ban on all kinds of investment in the production of cluster munitions and calls for disinvestment from financial institutions that refuse to support such a ban.

The following extract from the 'key findings' of a report on the issue by IKV Pax Christi and Netwerk Vlaanderen – both members of the CMC – provides background and sets out the Coalition's general position:

Although the Convention on Cluster Munitions does not explicitly prohibit investments in cluster munitions, prohibition on assistance that is included in art 1c of the convention should prevent states from investments in cluster munitions producers according to the authors. Financing and investing are active choices, based on a clear assessment of a company and its plans. Investing in a cluster munitions producer therefore is a choice to support the production of weapons that cause unacceptable harm.

As this report shows, there seems to be a double standard in the majority of the countries that have signed the CCM. From the moment the CCM will enter into force, state parties of the Convention are legally prohibited from producing cluster munitions and from assisting the production of cluster munitions by any third party. To date Belgium, Ireland and Luxembourg have installed a ban on investments in cluster munitions producers under national law and can provide a model to both signatory and

---

<sup>74</sup> Docherty, "Breaking new ground", pp. 961-2

<sup>75</sup> The website of the 'Stop explosive investments' campaign is available at: <http://www.stopexplosiveinvestments.org/>

non signatory states. Until now however, banks and other financial institutions in or from many countries have been allowed to continue their investments in cluster munitions. This undermines the commitment 100 countries have made to ban cluster munitions and runs counter to the spirit of the CCM.

The case for financial institutions to disinvest in cluster munitions is both a legal and a moral argument. Since 2007 the human and economic cost arising from the use of cluster munitions have been widely acknowledged and documented. Thus, even before the CCM opened for signature financial institutions should have been aware of the controversy around cluster munitions and should have started disinvesting from producers of cluster munitions. from the entry into force of the CCM. The time to act is now. For signatory states to the CCM, for nonsignatory states and for financial institutions alike.<sup>76</sup>

Article 1(c) of the Convention states that: “Each State Party undertakes never under any circumstances to: [...] (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”

As described in section 4 of this paper, the current Bill before Parliament prompted debate in the House of Lords over how adequately its provisions deal with the issue of prohibiting investment in the manufacture of cluster munitions. On 7 December 2009, the day before the Bill was due to have its Second Reading in the Lords, the Minister for Europe, Chris Bryant, made the following Written Statement:

In response to the interest of civil society and parliamentarians, I would like to set out the Government's understanding of how the Bill's prohibitions apply to the financing of cluster munitions production. Under the current provisions of the Bill, which have been modelled upon the definitions and requirements of the convention, the direct financing of cluster munitions would be prohibited. The provision of funds directly contributing to the manufacture of these weapons would therefore become illegal.

The convention does not prohibit so-called indirect financing of cluster munitions. Indirect financing is therefore not within the scope of the Bill's provisions. As such, it would not become illegal to provide funds generally to companies that manufacture a range of goods, including cluster munitions.

However, aware of the humanitarian suffering caused by cluster munitions and the threat they pose to development in post-conflict areas, the Government are keen to see a complete end to cluster munitions. Due to the complex nature of indirect financing, there is a need for thorough consultation to consider the impact of any measures, and to ensure that we develop the most appropriate and effective measures to end indirect financing.

The Government intend to work with the financial sector, non-governmental organisations and other interested parties, to promote a voluntary code of conduct to

---

<sup>76</sup> IKV Pax Christi and Netwerk Vlaanderen, Key findings of report, “Worldwide investments in cluster munitions: A shared responsibility”, 29 October 2009. Available at: <http://www.stopexplosiveinvestments.org/uploads/pdf/keyfindings-worldwide-investments-in-cluster-munitions.pdf>. The full text of the report is available at: <http://www.stopexplosiveinvestments.org/uploads/pdf/worldwide-investments-in-clustermunitions-a-shared-responsibility.pdf>. The report (p. 7) states that Lebanon, Norway, Mexico and Rwanda, which are all currently signatory states, have publicly declared that all investment is prohibited under the Convention. For a full assessment of the strengths and weaknesses of legislation passed at the national level at the time the report was published, see pp. 84-91 of the report. The report primarily comprises a ‘hall of shame’, listing hundreds of financial institutions that, at the time it was published, were believed still to be investing in cluster munition production. The ‘hall of shame’ includes some British and/or British-based financial institutions. More positively, the report also includes a ‘hall of fame’.

prevent indirect financing, and if necessary would use their right to initiate legislation. We shall also review public investment guidelines to the same end.<sup>77</sup>

Baroness Kinnock did not mention the possibility of initiating legislation during the Second Reading of the Bill in the Lords.<sup>78</sup>

There was widespread concern about the issue of ‘indirect financing’ during the passage of the Bill through the House of Lords. It seems certain that the issue will remain on the official agenda regardless of the outcome of the UK General Election in 2010. Pressure to legislate may continue to come from those who do not believe that a voluntary code of conduct will be sufficient. It is interesting to note that the CMC, the NGO coalition which is campaigning on the issue, has responded to the initiative of the UK Government in broadly positive terms.<sup>79</sup> Finally, only time will tell whether – and if so, how far – the UK will take an active stance on the issue at the multilateral level.

Since the CMC’s campaign began in late October 2009, there have also been developments in other countries. In New Zealand, a Bill to implement the Convention has been passed which includes a ban on all investment in the manufacture of cluster munitions. The Dutch Parliament has also passed a motion calling for a ban on all investment in the manufacture of cluster munitions.<sup>80</sup>

---

<sup>77</sup> HC Deb 7 December 2009 c2WS

<sup>78</sup> HL Deb 8 December 2009 c1021

<sup>79</sup> CMC, “Three more states take action to ban investments”, press release, 16 December 2009. Available at: <http://www.stopexplosiveinvestments.org/news/5/59/3-more-states-take-action-to-ban-investments>

<sup>80</sup> Ibid